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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 528

BROAD RIVER POWER CO., *et al.*
Petitioners

v.

STATE OF SOUTH CAROLINA, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

SUPPLEMENTAL BRIEF FOR PETITIONERS ON REHEARING

C. EDWARD PAXSON
GEORGE M. LEPINE
W. C. McLAIN
Counsel for Petitioners

WM. MARSHALL BULLITT
Of Counsel

APPEAL PRINTING CO., 20 VESEY ST., NEW YORK CITY

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SUPPLEMENTAL BRIEF FOR PETITIONERS ON REHEARING.

I. Preliminary Statement.

This case was before this Court at the last Term and the Writ of Certiorari previously granted to review the judgment of the Supreme Court of South Carolina was dismissed, the opinion of this Court being rendered by Mr. Justice STONE (281 U. S. 537). A petition for rehearing was thereafter filed, and a rehearing was ordered by the Court on October 12, 1930.

The case involves the right of the State of South Carolina to require the public utility companies, which are

the petitioners in this Court, to resume permanent operation of the street railway system in Columbia, S. C., operation of which was abandoned in March, 1927, because during the last seven years of its operation it had been run at an annual actual operating loss, amounting over that period to $675,000 before making provision for fixed charges, depreciation, or return upon the investment and the operation of which in the future could only be had at a loss.

The decision of the South Carolina Court was correctly analyzed by Mr. Justice STONE in his opinion, as follows:

> "The Supreme Court, upon consideration of the evidence taken before a referee, held (a) that although the books of the street railway showed large financial losses, it could be operated at a profit if properly managed; (b) that the charter and certain city ordinances under which the street railway system was constructed and operated, and certain extension-line and right-of-way agreements, are effective as contracts imposing on petitioners a duty to operate the system; and, (c) that the privilege of operating the street railway is inseparable from that of operating the electric power and light system, and that together they constitute a unified franchise, which cannot be abandoned in part and retained in part without the consent of the state; that so long as respondents retain and operate their electric power system they cannot be permitted to abandon their street railway system."

In the view taken by this Court, however, only the conclusion designated as (c) above was considered.

This Court held that the conclusion of the South Carolina Court as to the effect of the Consolidation Act under which the present railway company was incorporated presented a State ground of decision which must be accepted by this Court unless found to be without any substantial basis. That conclusion was that the Consolidation Act created a unified franchise for street railway and electric business. Accepting this view of the State Court, it was held that it was within the constitutional power of the State to refuse to permit any partial abandonment of the consolidated franchise, so that this Court could not interfere with the holding of the State Court that the street railway business could not be given up because of the fact that it could not be operated except at a loss, so long as the utilities continued in the electric business.

This Court further held that the proceedings by which the electric properties of the railway company were conveyed to the power company did not operate to relieve the power company from any obligations to operate the railway which existed at the time of the transfer.

It is the contention of the petitioners:

1. That under the previous decisions of this Court even if the conclusions of the State Court are to be adopted, that the railway and electric businesses were conducted under a unified franchise, still the State cannot compel the operation of the railway at a loss;

2. That no binding effect can be given by this Court to the decision of the South Carolina Court as to the

effect of the consolidated charter or the existence or construction of alleged contracts, but that this Court must reach its own independent conclusion thereon; and

3. That under the evidence in this case it conclusively appears that the street railway system in question cannot be operated except at a devastating loss.

The principal questions in this case have been fully covered by the brief filed by the petitioners on the original hearing in this Court, and this brief will be confined to a discussion of the three questions above outlined.

II. Even if the statute incorporating the Consolidated Railway and Electric Company created one unified franchise for street railway and electric service, the State could not require operation of the railway at a loss.

This Court is definitely committed to the rule that a State cannot fix a non-compensatory rate on one product on the theory that the losses produced can be absorbed in charges for other products.

Northern Pacific R. Co. v. *North Dakota*, 236 U. S. 585;

Norfolk & Western Ry. v. *West Virginia*, 236 U. S. 605;

Chicago, Milwaukee & St. Paul R. Co. v. *Public Util. Com.*, 274 U. S. 344.

The rule that a public service company may not be compelled to serve, even in a branch of its business, at

a rate which is confiscatory, which was asserted in *Northern Pacific R. R. Co. v. North Dakota*, 236 U. S. 585, **is based on the principle that a utility is entitled to compensation for the use of its property devoted to such branch of its business, and that to require service without compensation constitutes confiscation. When, therefore,** it appears, as in the case at bar, that varying rates of fare have been tried and found not to be compensatory (see *infra*, p. 27), and that **no rate of fare can be compensatory, to require service at any rate of fare (for there must be some established rate) must be deemed to constitute confiscation.**

In *Northern Pac. R. Co. v. North Dakota, supra*, the right of a State to fix a non-compensatory rate on coal because the intra-state business as a whole was profitable was denied because of the rule that a public service company may not be compelled to serve, even in a branch of its business, at a rate which is confiscatory.

The unified street railway, light and power franchise here, is certainly **not more unified** than the Northern Pacific's franchise to carry various kinds of freight (coal, wheat, merchandise, etc.) and passengers; and yet the Court held that North Dakota could not compel a railroad to carry **coal** at a non-compensatory rate, even though its total intra-state business showed an **adequate return,** because such a course would compel **wheat** to pay too high a rate in order to absorb the coal loss. As a branch of utility service, the electric light and power business is **far more distinct** from street railways than

wheat traffic was from coal traffic in the *North Dakota* case.

In the case at bar did the Court mean to hold that electric light and power consumers could by increased light and power rates be made to bear the losses in street railway operation, so that the total receipts from the unified franchise would be compensatory for the unified investment? If so, what becomes of the doctrine of the *North Dakota* case?

In *Chicago, Milwaukee & St. Paul Railway Company* v. *Public Utilities Com.*, 274 U. S. 344, the State sought to support the rate fixed by it for carrying logs, which concededly would result in loss, by claiming that the returns from the carriage of the logs and the lumber manufactured therefrom should be considered together and if no loss resulted from the combined carriage its order could be sustained. This contention was repudiated by this Court on the ground that the State had no power to require petitioners to haul logs at a loss even if they received adequate revenues from the log haul and lumber haul taken together, citing *Northern Pacific Railway* v. *North Dakota*, 236 U. S. 585, and other cases.

It is true that the case at bar is not a rate case, but in view of the certainty that street railway service by this company must be given at an operating loss (see *infra* V), the case of *Northern Pacific R. Co.* v. *North Dakota*, *supra*, and the principle on which that case was decided are directly applicable.

The fundamental basis of that decision is that the power of the state to regulate rates (and service) is

founded on its police power, which extends to property which is employed in a public business, and reasonable regulations are to be sustained while unreasonable regulations are in conflict with the property rights of the owners and are to be set aside. It was accordingly held in the *North Dakota* case that it was unreasonable to require that coal be carried at a loss, even though the total business of carriage showed no loss, the Court saying (236 U. S. at 595):

> "The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight."

That it is the dedication of the property to a public use, and not any contractual relation, which authorizes the state to make reasonable regulations as to the service which shall be rendered in the management of the property so dedicated, is evident from other decisions of this Court. These cases establish the rule that once property has been devoted to a particular public use the state may make reasonable regulations governing that use, and may require service to be rendered in connection with that use, though pecuniary loss must unavoidably be incurred, but that a state may not require property devoted to one pub-

lic use to be applied to a different public use, and may not prevent the withdrawal of property devoted to a particular public use when the property can be operated only at a loss.

In the case of *Chesapeake & Ohio Railway Company v. Public Service Commission of West Virginia*, 242 U. S. 603, the Court had under consideration an order of the West Virginia Commission requiring the Railway Company to install and maintain passenger service on a branch line of the Railway which had never been used for anything except freight service. The Court said:

> "It well may be that the power of regulation which a state possesses over private property devoted to public use gives no warrant for requiring that an existent line of railroad lawfully devoted to a particular public use, such as carrying freight, shall be devoted to a further public use, such as carrying passengers, Northern Pacific Co. v. North Dakota, 236 U. S. 585, 595."

It was held, however, that as the road was put in operation under a charter which provided that it should be devoted to the carriage of passengers and freight, the dedication, in effect, was for both purposes.

In *Wolff Packing Company* v. *Court of Industrial Relations of Kansas*, 262 U. S. 522, opinion per Chief Justice TAFT, which involved an order of the Industrial Court relating to wages in a meat packing plant, the right to regulate which was questioned, the Court said (p. 543):

> "The power of a legislature to compel continuity in a business can only arise where the obligation of

> continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss, Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396; Bullock v. Railroad Commission, 254 U. S. 513; it may give up its franchise and enterprise, but short of this, it must continue. Not so the owner when by mere changed conditions his business becomes clothed with a public interest. He may stop at will whether the business be losing or profitable."

It will be seen from the foregoing language that the real basis for the obligations which arise in the case of a railway is the dedication of the property to a public use by putting the railway in operation under a legislative grant, rather than a contract relation which exists from the charter itself.

In *Atlantic Coast Line Railroad Company* v. *North Carolina Corporation Commission*, 206 U. S. 1, complaint was made as to an order of the State Railroad Commission requiring passenger schedules to be maintained between two points to furnish connection with through trains. The Court upheld the order and said (p. 20):

> "As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guarantees, and, therefore, wherever the

> power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment."

These cases make it quite evident that the right of a State to require a public service company to render a particular service arises out of the dedication of the property to a public use, and the power of regulation, and is not based on any purely contractual right.

Applying this rule, as thus explained, to the case at bar it becomes evident that when the railway company constructed its line of railway in the city streets it dedicated the same to the carriage of passengers and so long as it continued in that business it could not refuse to perform any railway service required of it, and it could not withdraw that property from the public service unless continued operation could only be had at a loss; when it engaged in the electric light and power business it dedicated its electric properties to the rendition of electric services, in the same way and subject to the same limitations, and the same limitations apply to its gas properties, but, to paraphrase the language of Mr. Justice VAN DEVANTER in *Chesapeake & Ohio R. Co.* v. *Public Service Com.*, 242 U. S. 603, the power of regulation which a State possesses over private property devoted to public use gives no warrant for requiring that an electric property lawfully devoted to a particular public use, such as furnishing light and power, shall be devoted to a fur-

ther public use, such as carrying passengers on a street railway.

The State of South Carolina contends, however, that the business of the Company must be treated as a whole, street railway, electric and gas, and if the property as a whole yields a fair return, losses incurred in a branch of the service furnish no justification for an abandonment of that branch.

This conclusion was accepted by this Court on the original hearing of this case, reliance being put on the following cases:

United Fuel Gas Co. v. *Railroad Commission of Kentucky*, 278 U. S. 300, 308; *Fort Smith Light & Traction Co.* v. *Bourland*, 267 U. S. 330; *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574; *Ches. & Ohio Ry.* v. *Public Service Comm.*, 242 U. S. 603; *Mo. Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262, 277. See *Woodhaven Gas Light Co.* v. *Public Service Comm. of N. Y.*, 269 U. S. 244; *N. Y. & Queens Gas Co.* v. *McCall*, 245 U. S. 345; *Atlantic Coast Line* v. *North Carolina Corporation Commission*, 206 U. S. 1, 25.

As all of these cases relate to a single public service, it is necessary to ascertain the basis of the rule, in order that its scope may be clear.

That basis, as already demonstrated, is the right to regulate property dedicated to a public use and to require that the service to which it was dedicated shall be fully performed.

Illustrative of the cases relied on by the State is *United Fuel Gas Company* v. *Railroad Commission of Kentucky*,

278 U. S. 300, which involved the question of rates as well as the right of a gas company to withdraw from business in a part of its territory within the State. The Court held that the State might require the company to continue to use present facilities to supply gas at any particular place within the State so long as it continued to do business in the State. The Court through Mr. Justice STONE said (p. 309) that "If a public service company may not refuse to serve a territory where the return is reasonable, or even in some circumstances where the return is inadequate but that on its total related business is sufficient," citing *Atlantic Coast Line* v. *North Carolina Corporation Commission*, 206 U. S. 1; *Missouri Pacific Railway Company* v. *Kansas*, 216 U. S. 262, it followed that the company could not use its business as a weapon to control rates by threatening to discontinue part of its service if it did not receive the rate demanded.

And in *St. Louis & San Francisco Railway Company* v. *Gill*, 156 U. S. 649, 665, the Court said that a railway company could not claim the right to earn a net profit from every mile, section or other part into which the road might be divided nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative.

In *Puget Sound Traction, etc., Company* v. *Reynolds*, 244 U. S. 574, the order of the Public Service Commission complained of required service on a branch line. The Court held that though the branch line was operated at a loss the case of *Northern Pacific Railway Com-*

pany v. *North Dakota*, 236 U. S. 585, was not controlling where the passenger business of the company as a whole was profitable and that the correct test was the effect of the order on the entire line of the company.

These cases afford absolutely no sanction for any holding that in this case the Court must treat the street railway, electric and gas businesses as a whole and that losses in the street railway business are immaterial so long as the entire business of the company shows no loss.

If the contention of the State of South Carolina and the decision of the State Court are to be sustained on the ground that the business of the company must be treated as one public service enterprise, then, as held in *Texas* v. *Eastern Tex. R. R. Co.*, 264 U. S. 79, 85, that property must be considered to have been devoted as one entire property to the use of the public "on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return," and this means that if losses are incurred in the street railway they must be made up out of the electric rates. **This results in requiring consumers of electricity to pay a portion of the cost of transportation of street car passengers,** who may be an entirely different set of persons. Any such decision is contrary to the decision in the case of *Northern Pacific R. Co.* v. *North Dakota, supra,* and the other decisions which have followed it.

To announce the doctrine that there is a unified franchise and a single public service and that street railway service at a loss may be required so long as the electric business is continued lays the basis for **putting the street**

railway losses on the electric consumers, as no contention could be made thereafter that being unified from the standpoint of service they are not unified for the purpose of rates.

The principles contended for by the petitioners have the sanction of the courts in decisions which, while not binding on this Court, contain reasoning which should commend them to the Court's consideration.

In *Mt. Carmel Public Utility, etc., Co.* v. *Public Util. Comm.*, 297 Ill. 303, the Mt. Carmel Co. was engaged in the business of furnishing gas, electricity, water and heat. The heating business proving unprofitable, the Company petitioned the Public Utilities Commission for permission to abandon its heating service and to surrender its franchise. The Public Utilities Commission directed the Mt. Carmel Co. to resume the rendering of heat service immediately. The Court held that it could not be required to do so, saying (pp. 308-311):

> "The state has no power to compel a corporation engaged in operating a public utility to serve the public without a reasonable compensation. * * * If the corporation is required by any act or proceeding to devote to the public the use of its property without compensation or without any reasonable compensation, it has been deprived of its property and of the equal protection of the law. Where a public utility corporation is engaged in furnishing to the public through various departments of its business, different kinds of service, it cannot be compelled to carry on a branch of its business which furnishes one kind of such service at a loss, even though at the same time its

whole business may be conducted at a profit. Brooks-Scanlon Co. *v.* Railroad Com., 251 U. S. 396; Northern Pacific Railroad Co. *v.* North Dakota, 236 U. S. 585; Norfolk & Western Railroad Co. *v.* West Virginia, 236 U. S. 605. * * * The evidence taken indicated that the heating plant was practically worthless; that to enable it to render satisfactory service during the season would require substantially its entire reconstruction, and would require an expenditure of $100,000—an amount equal to the value of the plant—and that the plant would not then pay for its operation and any return on the investment. This was the condition as shown *prima facie* by the evidence, and such a condition would justify the petition of the company to abandon the service. * * * An order without investigation—without any finding of facts on which it was based—requiring practically the construction, at great expense, of a new plant which could not be expected to earn a reasonable return on the investment, was not reasonable but amounted to requiring the appellant to devote its property to the public use without regard to compensation."

In *Illinois Trust & Savings Bank* v. *Doud*, 105 Fed. 123, the Circuit Court of Appeals for the Eighth Circuit (SANBORN, J.) said (pp. 127-129):

"The proof is conclusive that the railway was conducting three classes of business,—operating a street railway by electricity, furnishing steam heat and power, and furnishing electric light; that it could conduct either one or two of these occupations without the others or the other, and that it had ample power, without the new building and machinery, to operate

its street railway, to furnish its customers with steam heat and power, and to furnish some of its customers with electric light. * * * It could have abandoned the business of furnishing electric light entirely, and have continued to operate its street railway and to furnish steam heat and power to its customers, or it could have abandoned all its business but the operation of its street railway, and it would still have been a going concern. * * * Under its articles of incorporation the railway derived from the state power (1) to buy, construct, sell, lease, and operate street railways in Ottumwa; (2) to buy, construct, sell, lease, and operate a plant for furnishing steam heat and power; and (3) to buy, construct, sell, lease and operate a plant to supply and furnish electric light to the city of Ottumwa and its inhabitants. This corporation derived the privilege of erecting its poles and stringing its wires along the streets of Ottumwa to furnish electric light from a set of ordinances entirely distinct from those which permitted the use of the streets of the city for its street railway and for its pipes to furnish steam heat and power. The ordinances relative to its electric lighting imposed no conditions upon its business of furnishing steam heat and power, or upon its business of operating the street railway. Now, conceding that the franchises of a public or quasi public corporation may be forfeited for misuse or renunciation, still the entire failure of this corporation to exercise its power to furnish electric light would have furnished no ground for the forfeiture of its franchises to furnish steam heat and power and to operate its street railway. Another of the franchises granted to this corporation under its articles was the power to buy, hold, use, and sell the corporate stock

of any competing corporations in the city of Ottumwa. None of the franchises to operate a street railway, to furnish electricity, or to furnish steam heat and power could have been forfeited because the corporation had not exercised its power to purchase the stock of rival corporations. No corporation is required to exercise all the powers granted to it by its organic law as a condition of the exercise of some of them unless that requirement is expressly made by some statute or ordinance under which it derives some of its powers or privileges, or the powers are inseparably connected with each other."

The foregoing decisions, we submit, establish conclusively that even though the act creating the present railway company is to be considered as granting all the powers which the company possesses, the railway business cannot be required to be operated at a loss, and any contrary holding is in direct conflict with the previous decisions of this Court.

III. No binding effect can be given by this Court to the decision of the South Carolina Court as to the effect of the Consolidated Charter or the existence or construction of alleged contracts, but this Court must reach its own independent conclusion thereon.

The sole question in the case at bar was whether the petitioners could be compelled to operate a losing street railway system, and the sole defense was that to compel them to do so violated their rights under the Fourteenth Amendment. It was recognized that, **in the absence of a specific contract,** to require such operation would vio-

late such constitutional rights. The South Carolina Court was therefore compelled to pass on the question **whether there was a contract.** There was here no question of Federal and non-Federal grounds of defense, but one complete defense on a Federal ground.

The South Carolina Court held that the statutory charter of the defendant railway company constituted a contract. As its decision is opposed to the previous decisions of this Court as to the effect of a consolidation of corporations (see pp. 21-23, *infra*) it is important to determine the force of the South Carolina Court's decision in this Court.

It is true that where a case involves both Federal and non-Federal questions, and a non-Federal ground of decision has fair support, this Court will not inquire whether the decision of the State Court is right or wrong (*Vandalia R. Co.* v. *Indiana*, 207 U. S. 359; *Enterprise Irrig. Dist.* v. *Farmer's Mutual Canal Co.*, 243 U. S. 157) but if the non-Federal ground is without substantial support, constitutional issues will not be permitted to be evaded.

Ward v. *Love County*, 253 U. S. 17;
Leathe v. *Thomas*, 207 U. S. 93.

Again where property rights are claimed to have been interfered with, the nature and scope of those rights is a State question.

Sauer v. *City of New York*, 206 U. S. 536;
Fox River Paper Co. v. *R. R. Com.*, 274 U. S. 651.

But in a case like the case at bar

> "Where it becomes necessary to consider whether a state is depriving, or attempting to deprive, a litigant of property without due process of law in violation of the Fourteenth Amendment, and the question turns on the existence and terms of an asserted contract, this Court determines for itself whether there is a contract and what are its terms. Louisville & Nashville R. R. Co. v. Palmes, 109 U. S. 244, 255; Stearns v. Minnesota, 179 U. S. 223, 232. 'The principle is general and necessary. Ward v. Love County, 253 U. S. 17, 22. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.' Davis, Director General of Railroads v. Wechsler, 263 U. S. 22, 24."
>
> *Texas* v. *Eastern Texas R. R. Co.*, 264 U. S. 79, at 86, 87.

In that case the question involved was whether a railroad company had a right to abandon its road. The State asserted that contracts existed which precluded such abandonment, the asserted contracts being statutory provisions which it was claimed became a part of the charter contract of the company. That case is, therefore, in all respects like the case at bar in that contracts consisting of State statutes were set up as a justification for requiring operation at a loss.

In *Georgia Railway & Power Company* v. *Town of Decatur*, 262 U. S. 432, the question at issue was the

right of a railway to increase its rate of fare notwithstanding an ordinance fixing the rate of fare at 5c. which was claimed to constitute a contract. It was admitted that the State Constitution conferred upon the General Assembly general authority to fix rates. The State Court held that it was competent for the municipality to enter into such a contract where the State had not exercised and was not seeking to exercise its police power over the subject and that this contract would remain effective until there should be conflicting legislative action. The Supreme Court said (p. 438):

> "This conclusion, involving, as it does, a construction of the state constitution and laws and powers of state municipalities, is controlling upon this Court, as it has decided many times. See, for example: Old Colony Trust Co. *v.* Omaha, 230 U. S. 100, 116; Claiborne County *v.* Brooks, 111 U. S. 400, 410; Richmond *v.* Smith, 15 Wall. 429, 438.
>
> "On the other hand, in deciding the constitutional questions presented, this Court will determine for itself whether there is, in fact, a contract and, if so, the extent of its binding obligations, but will lean to an agreement with the state court."

The rule laid down in these cases that in the determination of the constitutional rights of parties, where the question turns on the existence and construction of an alleged contract, this Court will determine for itself the existence and terms of the alleged contract, is too well settled to be the subject of dispute.

Appleby v. *City of New York*, 271 U. S. 364;
Louisiana Railway & Navigation Co. v. *New Orleans*, 235 U. S. 164;
Douglas v. *Kentucky*, 168 U. S. 488;
St. Paul Gas L. Co. v. *St. Paul*, 181 U. S. 142;
Atlantic Coast Line R. R. Co. v. *City of Goldsboro*, 232 U. S. 548;
New York Electric Lines v. *Empire City Subway Co.*, 235 U. S. 179.

IV. The statute creating the Consolidated Railway and Electric Company did not create a unified franchise for street railway and electric service.

In the original brief filed by the petitioners (pp. 49-53), the decisions of this Court as to the effect of the Consolidation Act are fully considered, and the authorities therein cited show that this Court is committed to the rule, which is supported by the great weight of authority, that where two public utility companies are authorized to consolidate, the Act of Consolidation operates to create a new corporation, but the franchises of the constituent companies so far as they authorize the use of public streets for utility purposes continue in full force and effect and are the property of the consolidated corporation. These decisions show that the Consolidation Act does not create any franchise, except a franchise to be a corporation.

The Court is referred to the cases cited in the original brief and particularly to the case of *Louisville* v. *Cumberland Tel. and Tel. Co.*, 224 U. S. 649. That case in-

volved the rights of a consolidated corporation created in 1900 which claimed that under the charter of a constituent company, organized in 1886, the consolidated company had a perpetual right to maintain a telephone system on the streets of the City of Louisville. In that case the charter of the original Telephone Company conferred upon it the right to occupy the city streets "with and by the consent of the General Council of said city." This Court held that when the consent of the city was given the charter franchise became fully operative and thereafter the company occupied the streets not under a license from the City of Louisville but by virtue of its grant from the State of Kentucky. This State franchise was held to be property which was taxable, alienable and transferable "and, as property, passed to the Cumberland Telephone & Telegraph Company under the express provisions of the Kentucky statute which, as of force in 1900, declared that the consolidated company should be 'vested with all the property, business, assets and effects of the constituent companies, without deed or transfer, and bound for all their contracts and liabilities'" (p. 661). This is a direct holding that the consolidation statute did not create the franchise to use the city streets, which was property and passed as such, unimpaired, to the consolidated corporation.

Giving this effect to the consolidation statute it becomes evident that no single franchise to operate a street railway, gas and electric plant was granted by the statute, and that the railway franchise of the new corporation was the same franchise which was exercised by its constituent

company. This being the case, the railway company could not be compelled to use the assets of the gas and electric business to pay the losses of the railway business, but might abandon the railway business. This is in accordance with the rule laid down in *Brooks-Scanlon Co. v. Railroad Commission,* 251 U. S. 396, wherein this court said (p. 399):

> "The plaintiff may be making money from its sawmill and lumber business, but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. If the plaintiff be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. Munn *v.* Illinois, 94 U. S. 113, 126. The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return."

V. The evidence conclusively shows that the street railway system in question cannot be operated except at a devastating loss.

From January 1, 1920, to March 1, 1927, the actual *cash operating loss* in the operation of the railway system, was $675,199.47, without making any provision for depreciation or for a return on the company's investment (R. 1119).

The Special Referee thus summarized the evidence regarding the losses (R. 158, 159, 160, 164):

"The evidence clearly shows that for a number of years the street railway business in the City of Columbia has been operated at a heavy loss. Exhibit A-19 [R. 1118-1119], which is a summary from the books of the railway company, indicates that the operating loss before depreciation or interest from January, 1920, to February, 1927, inclusive, amount to $675,199.47. This statement includes charges for 'power purchased,' which is an interdepartment or intercompany charge, and petitioners [South Carolina] contend that this charge should be eliminated or at least greatly reduced. There was also testimony that the power company charged the railway company a much higher rate than it did the Pacific Mills. The Referee does not consider it necessary to discuss the testimony pro and con in regard to this rate. Even at the minimum rate the losses run into very high figures. This statement also includes for the period since the conveyance to Broad River Power Company a charge for pole rental. The following is a statement by years compiled from Exhibit A-19 showing the losses, including 'power purchased' and excluding 'power purchased'; and deducting the en-[fol. 210]tire amount for pole rental:

Years	Losses, including "power purchased"	Losses, excluding "power purchased"	Gains, excluding "power purchased"
1920	$ 94,533.64	.....	$ 9,510.96
1921	49,232.73	.....	17,892.19
1922	144,513.21	$91,906.41	.....
1923	102,477.28	42,164.38	.....
1924	138,047.05	80,834.05	.....
1925	87,812.13	41,651.33	.....
1926	47,630.35	20,125.75	.....
Jany. and Feby. 1927 ..	10,953.08	7,052.48	.....
Totals	$675,199.47	$283,734.40	$27,403.15
Less gains 1920 and 1921		27,403.15	
		$256,331.25	
Less pole rental		3,498.89	
Total losses, excluding "power purchased" and pole rental		$252,832.36	

"Of course, it would not be proper to eliminate the power charge entirely, because the actual cost of the power would in any view of the case be a proper charge. This also might apply to some charge for pole maintenance. It will be borne in mind that the foregoing statement covers operating losses only without any provision whatsoever for depreciation and without any allowance whatsoever for interests or earnings on the investment. The testimony on behalf of respondents [Consolidated Co.] was that at least $50,000 a year would be a proper charge for depreciation. Even if

this charge for depreciation is reduced by half the total of such charge over the period of years would amount to about $175,000, which would raise the entire loss on the basis of the above minimum statement to over $400,000, with no provision for any return on the investment. It will be noted that the losses appear to have commenced in 1920, although the strike above referred to was not until 1922. It is true that the above statement shows that eliminating the power purchased there were small gains in 1920 and 1921, but this would be entirely wiped out by a minimum charge on account of depreciation. * * *

"The Referee is constrained to the conclusion as a matter of fact that after taking into consideration all of the evidence the street car system in the City of Columbia has been running at a *devastating loss* over a period of years, and that this loss commenced some time before the intervention of the Barstow interests. Not only were the investors receiving no return from the railway system, but without allowance for depreciation, the 'out of pocket' loss was running up into high figures. It was testified on behalf of respondents [Consolidated Co.] that it would cost from $550,000 to $600,000 expended over a period of two or three years to put the system in operation, and that of this amount $125,000 would have to be expended in a very short period in order to operate a few cars; and that about $65,000 would be necessary to make repairs on the tracks."*

* The court below in its opinion gives some figures on earnings, but these were earnings from the electric business, and not the street railway business (R. 244) as pointed out in petition for rehearing in that court (R. 267). This error was subsequently corrected by a revision of the opinion, the corrected opinion having been filed with this court since the record was printed.

It appeared that, with the co-operation of the Railroad Commission, the company had changed its rate of fare from time to time in an effort to make the railway pay its operating expenses. The original five cent fare had been increased to seven cents with three tickets for twenty cents, with free transfers (prior to January 1, 1925). Next a cash fare of seven cents, three tickets for twenty cents and a transfer charge of three cents was tried (January 1, 1925 to December 15, 1925). This was followed by a zoning arrangement with a five cent fare (December 15, 1925 to June, 1926) and later a ten cent fare with three tickets for twenty-five cents, and free transfers (June, 1926 to March, 1927) (R. 542-545). All these efforts to make the railway pay its way were without avail.

There is no evidence by anyone experienced in street car operation, either that the system could be operated at a profit or that anything could be done to improve the methods of operation.

The only witness on this point for the State was a City Councilman, who said that if competition were removed and the road improved he thought they might be able to make a little money (R. 438, 442). Such testimony cannot overbalance the testimony of experienced operators (R. 545, 502, 536, 537, 541, 543-547, 570, 731, 732, 735) and the hard fact that the Company lost hundreds of thousands of dollars for seven years and had to borrow large sums to continue operation. Common sense and business experience prove that corporations do not delib-

erately lose $100,000 a year for a long series of years if it can possibly be avoided.

The basis of the attack by the State on the management of the railway was the alleged acts of the company beginning with January 1, 1926 (R. 781) (after 6 years of losses) in encouraging bus competition. An executive of the company testified that the company desired to see that, if possible, an adequate system of transportation would be provided for the community before the street railway system stopped operating (R. 577), and the testimony which the State introduced to prove that the railway aided the bus company showed that the bus company did not enter into the situation until after public announcement was made that the street railway intended to cease operations (R. 775). This testimony, therefore, does not have any effect on the right of the company to abandon, as it does not show that the railway could be operated other than at a loss.

Some attack also was made on the charges for power used in street railway operations and a small charge for rental of poles (which were maintained by the electric company). It was shown, however, that the rate charged to the railway was entirely proper and reasonable (R. 709, 712). In any event, as found by the referee, even if power and poles had been furnished without charge there would still have been operating losses in railway operation between 1920-1927 of $252,832.36 (R. 159). To require that power be furnished without cost, however, would result in requiring the electric consumers to pay

for power furnished for the benefit of street railway passengers, which, as heretofore shown, is not permissible.

As stated in the original brief of petitioners, the suggestion of the South Carolina Court that the system properly managed could be operated at a profit is "merely the language of hope" (*Brooks-Scanlon Co.* v. *R. R. Com.*, 251 U. S. 396, 400) and cannot overbalance the testimony of experienced operators and the hard fact of losses as shown by the evidence.

In face of the facts above stated, this Court must take it as an established fact that this railway system has been operated at devastating losses and cannot be operated except at a loss.

VI. The statutes, ordinances and private contracts set up by the State do not justify a requirement that the street railway in question be operated.

As stated in the original opinion of the Court, the South Carolina Court held that the charter and certain city ordinances under which the street railway system was constructed and operated, and certain extension-line and right-of-way agreements, are effective as contracts imposing on petitioners a duty to operate the street railway system in question.

As has already been demonstrated in this brief, the charter of the street railway company does not constitute a contract to operate at a loss.

So far as concerns the ordinances of the City of Columbia, they are fully discussed in the original brief filed

by the petitioners (pp. 30-40), and it is there pointed out that, as the ordinances fixed no rate of fare, they stand on the same plane as permissive charters which give rise to no obligation on the part of the company to operate its railroad at a loss. The cases supporting this principle are there discussed and the Court is referred to the original brief in support of this proposition.

There existed certain alleged contracts between the railway company or its predecessors and certain land development companies which were also relied upon by the State as creating an obligation to operate the system at a loss. As pointed out in the original brief of petitioners, one of the three contracts alleged was contained in a lease, which was afterwards merged in a deed without covenants executed and delivered to the railway company (pp. 40-42), another of the alleged contracts was never performed by the land development company (pp. 47, 48), and the third contract had been fully performed by operating the system for a period of about twenty-one years (pp. 42-47). As to all of these alleged contracts, as pointed out in the original brief (p. 47), they are subject to the objection that they are purely private agreements for the sole benefit of the parties thereto and they created no public duties that are capable of enforcement by the State. The Court is referred to the original brief which contains a full discussion of the cases which show that none of these alleged contracts are any justification for the requirement by the State that the railway system in question be continued in operation at a loss.

VII. CONCLUSION.

It is therefore respectfully submitted that the judgment of the court below violates the constitutional rights of the petititoners, and should be reversed.

C. EDWARD PAXSON,
GEORGE M. LEPINE,
W. C. MCLAIN,
Counsel for Petitioners.

WM. MARSHALL BULLITT,
Of Counsel.